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DEPARTMENT OF STATE

THE LEGAL ADVISER

February 10, 1958.

TO : E/MDAC - Admiral DeLany

FROM : L/E - Mr. Metzger *JWM*

SUBJECT: Eximbank Credits for Export from the United States and the Battle Act

Reference is made to your memorandum dated February 6, 1958, enclosing a letter from the Eximbank dated December 6, 1957, regarding the question whether extension of credit by the Eximbank to private Finnish importers is prohibited by the Battle Act. It appears that one US exporter (an Ohio firm) desires Eximbank's assistance for financing the sale of two power shovels to be used in connection with the construction of hydro-power plants and in the cleaning of waterways. The other US exporter has an order for machinery in the amount of \$75,000. It is our understanding that the Finnish importers are willing to pay 20% of the purchase price in cash and desire two years credit on the remaining 80%. The American exporters will extend credit to the extent of 25% of this 80% and the Eximbank is prepared to extend 75% of the 80% credit without recourse against the American exporter. The credit in each case will be guaranteed by a Finnish bank in which a "non-budgetary" agency of the Finnish Government holds one-fourth of one percent of the non-voting stock.

The Battle Act states that "no military, economic or financial assistance shall be supplied to any nation" which ships certain strategic commodities to iron curtain countries (Mutual Defense Assistance Control Act of 1951, 65 Stat. 644, 22 U.S.C. sec. 1611 et seq.). The question thus presented is whether the contemplated credit by Eximbank constitutes "assistance" to Finland, it being understood that Finland is a nation which ships such material to prohibited destinations within the meaning of the Battle Act.

Before considering this question, it might be appropriate to indicate briefly (to the extent relevant) the functions of the Eximbank under the Export-Import Bank Act of 1945, as amended. Eximbank, among other things, extends loans, guaranties, or financial assistance in other forms for the primary purpose of promoting the export and import trade of the US. Foreign trade has been assisted in the following ways:

1) By loans in which Eximbank participates with US suppliers in financing the sale and export of US products, principally of a capital goods nature;

2) By short term loans to finance the sale of US commodities, such as wheat and cotton, in traditional foreign markets;

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3) By loans to private enterprises for the development or expansion of foreign sources of strategic and essential materials required for defense and by US industries; and

4) By loans to private industry or governments for the procurement of materials, equipment, supplies or services in the US for development projects abroad which will improve the economy and strengthen the dollar exchange position of the foreign country.

The Eximbank assists United States foreign trade by means of direct financing and guaranties.

The Bank engages in direct financing of exports when it purchases from an exporter without recourse upon him a portion of the notes or acceptances of a foreign importer received by him in connection with an export sale. In a like manner, direct financing of exports is provided by the Bank when it makes loans to a United States or foreign private entity or foreign government for purchases of United States materials, equipment, or services destined for a project abroad. Similarly, the Bank directly finances imports when it purchases the obligations of a United States importer in connection with an import transaction.

In lieu of direct purchase of obligations by the Bank, the financing of either exports or imports is frequently provided through guaranties extended directly to exporters or importers, or through purchase of the obligations from them by a commercial bank or other financial institution in the United States under an agency or guaranty agreement with the Eximbank. Such guaranties may cover all of the risks of repayment or, if so requested, may be limited to coverage only of dollar transfer or other specified risks.

In other words, Eximbank's activity is (1) to provide exporter credits and (2) to make development loans at the request of foreign importers, whether public or private, of U.S. goods and services. Where assistance is requested by the U.S. exporter, Eximbank purchases from (and without recourse to) the U.S. exporter a portion of the obligation (usually 80%) issued by the foreign buyer. Eximbank requires that the remainder of the financial risk of the sale (usually 20%) be carried by the U.S. exporter, with or without the assistance of his commercial bank. (See, among others, the eighteenth Semi-Annual Report to Congress of the Export-Import Bank for the period January - June, 1954).

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With respect to development loans, they are made at the request of foreign importers, both public and private. From the point of view of American business such loans serve the same purpose as an export credit which is made at the request of an American supplier, i.e. they also assist the export of U.S. products and services. But their main purpose, although not necessarily in every case, is to assist the foreign country in improving its economy and to strengthen its dollar position.^{1/} The 1954 Report of the Senate Committee on Banking and Currency clearly recognized the distinction between the exporter type credit and the Eximbank development loan (Senate Report No. 1624, 83d Congress, 2d Session). It may be relevant to quote at length from this report which, in considering a bill to provide for the independent management of the Eximbank and for other purposes, states the following:

"As stated by the President of the United States on June 10, 1954, the changes proposed by the bill are --

designed to further the basic objectives of the bank, which are to aid in financing and to facilitate the export and import trade of the United States.

With this expression your committee wholeheartedly agrees.

It is the opinion of your committee that United States producers and workers should not be subjected to any credit preclusion which in this highly competitive world would put them in an unrealistic and disadvantageous position.

Twenty years ago the Congress created the Export-Import Bank. Over the years the bank has done a commendable and a reasonably effective job in promoting our foreign trade. However, the bank has \$1.3 billion in unused lending capacity. It is apparent that we have not fully and adequately used the present resources of this great bank in the credit structure of our international trade. Henceforward, in the best interest of the United States and its free-world friends the facilities of the bank should reasonably be expected to be materially expanded. The era of gifts and grants is passing. Normal business relationships are being re-established. Credit, not bounties, is again stimulating the progress of the free world. As the great creditor nation, it is

^{1/} A loan for the purpose of developing sources of strategic materials needed by the United States would normally be defined as a "development loan". For purposes of the Battle Act the question would need to be considered whether the loan was primarily for the benefit of the United States or for the foreign country. See our memoranda of July 16, 1951 and February 3, 1953.

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our responsibility to create a superior usable credit structure for proper international loans both for our own benefit and for the benefit of our foreign friends.

As the greatest producing nation of the world, it is in our interest as well as to the advantage of our free-world friends that purchases of equipment, materials, supplies, and services be made by them out of the proceeds of these credits so that while they profit from their use, we, in the United States, profit in the maintenance and growth of our industrial potential.

Your committee finds no legislative limitation upon the loan authority of the Export-Import Bank that would exclude it properly from making long-term, medium-term, or development loans.

Any distinction between long-term and short-term credits or between exporter credits, as such, and loans to facilitate the purchase by United States private investors abroad of capital goods and equipment in the United States is a highly artificial one, and quite undesirable from the standpoint of the interests of our country. The bank should sympathetically consider kinds and types of proper loan applications irrespective of term which would aid in facilitating the exports of the United States, maintain our industrial potential, and provide continuing employment in our country.

Small business, the backbone of the American free-enterprise system, should be encouraged to assume its rightful place in the foreign trade of this country. And to that end this legislation provides the means for fuller participation by small business in our international trade.

Testimony presented to your committee indicates that for a lengthy period few "exporter credits" were extended by the bank, because of the well-founded impression among exporters that such credits were not available to them at the bank. Your committee believes that the need for "exporter credits" existed in the past and that such need is especially apparent today. While many of our neighbors still want our products, they now are in a position to dictate the credit terms.

The United States producer, unable to secure financial aid to meet competitive foreign credit terms from normal private banking

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sources needs the assistance of the Export-Import Bank of the United States. Properly and effectively utilized, the bank will meet this need. Your committee has been assured that the Export-Import Bank is fully aware of this condition and the necessity for a positive and expanded program.

The Export-Import Bank has played an important role in our foreign economic policy and must continue to do so on an activated scale. Promotion of trade among the free nations of the world, and in particular, with the nations of the Western Hemisphere, is of utmost importance to the common welfare, the common defense, and the solidarity of the free world." (pp. 3-4)

From the foregoing, it would appear that there is a distinction between exporter credits of the Eximbank and development loans for purposes of the Battle Act. In the case of the former, what is intended is the maximum facilitation of the export and import trade of the U.S. In the case of the latter, the loans may be made primarily for the purpose of improving the economic situation of the foreign country. In the one case the dominant immediate purpose is to promote U. S. exports, while in the other, the benefit to the U.S. export trade is only a factor in a program whose main immediate purpose may be the economic development of a foreign country.

Consequently, it is our opinion that on the facts given the exporter credit is not "assistance" to a foreign country within the meaning of the Battle Act. The transaction in question is of the exporter credit type, the sole purpose of which is to promote the sale of an American product to the Finnish firm; it is a means by which to facilitate the sale of a U. S. product, one of the purposes for which the Export-Import Bank Act was enacted. In this respect, the Eximbank proposal is much like the CCC type of credit to American exporters of surplus agricultural commodities. Early in 1957 it was held by Counsel of I.C.A. that such credit as CCC extends is to the U.S. domestic exporter in order to aid him in making necessary arrangements with the foreign importer. Although this arrangement is instrumental in permitting the U.S. exporter to extend credit to the foreign importer for a short period of time and thereby give him time to sell the commodities and make payment, it was nevertheless felt that such sales are made without regard to the overall need of the foreign importer country for economic aid and are made on the same terms irrespective of which country is importing.

Accordingly, it is the opinion of this office that the credits referred to in Mr. Sauer's letter of December 6, 1957 do not constitute

"assistance"

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"assistance" within the meaning of the Battle Act. We will advise you separately with respect to Mr. Sauer's letter of November 19, 1957 to the OCB on the matter of the Cooley Amendment.

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